

E-filing

530 FILED
APR 8 2008 PM 3:25
CLERK OF COURT
NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE COUSTODY

Name: Mairs David L.
(Last) (First) (Initial)

Prisoner Number: T25433

Institutional Address: 1^H084 SQSP SAN QUENTIN, CA. 94974

UNITED STATES DISTRICT CCOURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID LOUIS MAIRS

Full Name of Petitioner

Case No. (to be provided by the
Clerk of court)

JF
(PR)

vs.

ROBERT AYERS (WARDEN SQ)

Name of Respondent
(Warden or jailor)

PETITION FOR A WRIT OF HABEAS CORPUS

Read Comments Carefully Before Filling In

When And Where To File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted or sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined Habeas L. R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland)

SUPERIOR COURT

Court

COUNTY OF MARIN

Location

(b) Case number, if known SC132965A(c) Date and terms of sentence 7 years

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes ☒ No ☐

Where? San Quentin State Prison

(Name of Institution)

San Quentin, CA

(Address)

2 For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code number if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P.C. §§ 459, 667.5(B)BURGLARY AND ONE PRIOR

3 Did you have any of the following?

Arraignment: Yes ☒ No ☐ Preliminary Hearing Yes ☒ No ☐ Motion to Suppress: Yes ☐ No ☒

4 How did you plea?

Guilty _____ Not Guilty ☒ _____ Nolo Contendere _____

Any other plea (specify) _____

5 If you went to trial, what kind of trial did you have?

Jury ☒ Judge alone ☐ Judge alone on a transcript ☐

6 Did you testify at your trial? Yes ☐ No ☐

7 Did you have an attorney at the following proceedings:

(a) Arraignment Yes ☒ No ☐

(b) Preliminary hearing Yes ☒ No ☐

(c) Time of plea Yes ☒ No ☐

(d) Trial Yes ☒ No ☐

(e) Sentencing Yes ☒ No ☐

(f) Appeal Yes ☒ No ☐

(g) Other post-conviction proceeding Yes ☒ No ☐

8 Did you appeal your conviction? Yes ☒ No ☐

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes ☒ No ☐

Nov. 15, 2005
(Year)

Judgment Affirmed
(Result)

Supreme Court of
California Yes ☒ No ☐

unknown
(Year)

Hearing denied
(Result)

Any other court Yes ☐ No ☐

(Year)

(Result)

(b) If you appealed, where the grounds the same as those that you are raising in this petition? Yes ☒ No ☐

(c) Was there an opinion? Yes ☒ No ☐

(d) Did you seek permission to file a late appeal under Rule 31(a)?
Yes ☐ No ☒

If you did, give the name of the court and the result:

9 Other than appeal, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes ☒ No ☐

NOTE: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if the petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. § 2244(b).

(a) if you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court Marin County Superior Court

Type of Proceeding Habeas corpus

Grounds raised (Be brief but specific):

a. Cunningham

b. _____

c. _____

d. _____

Result Denied

Date of Result March 28, 2007

II. Name of Court California Supreme Court

Type of Proceeding Habeas corpus

Grounds raised (Be brief but specific):

a. Cunningham

b. The lower courts abused their discretion in denying the writ

c. _____

d. _____

Result Denied

Date of Result Feb 27, 2008

III. Name of Court _____

Type of Proceeding _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result _____

Date of Result _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court? Yes ☐ No ☒

(Name and location of court)

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you need more space. Answer the same questions for each claim.

Note You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. § 2244(b); McCleskey v. Zant, 499 US. 467, 111 S.Ct. 1454, 113 L. Ed. 2nd 517 (1991)

Claim One: The sentencing court's imposition of the aggravated term in this case, violates petitioner's constitutional rights to a finding of aggravation by the jury (RT vol. V, pg. 337).

Supporting Facts: In imposing the aggravated term, this court use factors not found to be true by the jury. Ironically, at sentencing this court addressed the question of imposing the aggravating term in the absence of a jury finding (*Exhibit 'A'*; RT vol. V, pg. 324). In deciding this court should impose the aggravated term, the court concluded "our sentencing laws are within the guidelines established by *Blakely* (RT. Vol. V, pg. 325, li. 17-20). *Cunningham v. California*, 2007 DJDAR 1003; *In re Ward*, (1966) 64 C. 2nd 672, 675

Claim Two: The Superior Court abused it discretion in denying petitioner's *Cunningham* claims on the bases that *Cunningham* is not retroactive.

Supporting Facts: *Cunningham* is not a new rule, but clarification of the *Blakey* rule. In *Cunningham*, the court advises that California sentencing law also come under the *Blakey* rule. As mentioned supra the sentencing court in this case debated the application of

Blakey in this case and concluded that Blakey did not apply. Cunningham simply demands that
Blakey dose apply in California. Cunningham v. California 2007 DAR 1003

Claim Three: _____

Supporting Facts: _____

If any of these grounds was not previously presented to any other court, state briefly which grounds were
not presented and why

List by name and citation only, any cases that you think are close factually to yours so that the are an
example of the error you believe occurred in your case. Do no discuss the holding or reasoning of these
cases:


Do you have an attorney for this petition yes ☐ no ☒

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this
proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on March 21, 2008

Date


Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID LOUIS MAIRS

Plaintiff

CASE NUMBER:

vs.

ROBERT AYERS (WARDEN SQ)

Defendant

**PRISONER'S
IN FORMA PAUPERIS
APPLICATION**

I, DAVID LOUIS MAIRS, declare that I am the plaintiff in the above-entitled case and that, the information I offer throughout this application is true and correct. I offer this application in support of my request to proceed without being required to prepay the full amount of fees, costs or give security. I state that because of my poverty I am unable to pay the costs of this action or give security, and that I believe that I am entitled to relief

In support of this application, I provide the following information:

1. Are you currently employed ☐ Yes ☒ No

If the answer is "Yes" state both your gross and net salary or wages per month, and give the name and address of your employer:

Gross: _____ Net: _____

Employer: _____

If the answer is "no" state the date of your last employment, the amount of the gross and net salary and wages per month which you received. (If you are imprisoned, specify the last place of employment prior to imprisonment.)

2. Have you received, within the past twelve (12) months, any money from any of the following sources:

- a. Business, profession or other self-employment
- b. Income for stocks, bonds or royalties?
- c. Rent payments, interest or dividends

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

- d. Pensions, annuities or life insurance payments ☐ Yes ☒ No
 e. Federal or State welfare payment, Social Security ☐ Yes ☒ No
 Or other government source?

In the answer is "Yes" to any of the above, describe each source of money and state the amount received from each.

3. Are you married? ☒ Yes ☐ No

Spouse's Full Name: _____

Spouse's Place of Employment: _____

Spouse's Monthly salary, Wages or Income:

Gross: unknown Net: unknown

4. a. List amount you contribute to your spouse's support:

\$0

b. List the persons other than your spouse who are dependent upon you for support and indicate how much you contribute toward their support:

none

none

5. Do you own or are you buying a home ☐ Yes ☒ No

Estimated Market Value: \$ _____ Amount of Mortgage: \$ _____

6. Do you own an automobile? ☐ Yes ☒ No

Make: _____ Year: _____ Model: _____

Is it financed? ☐ Yes No If so, Total due: \$ _____

Monthly Payments: \$ _____

7. Do you have a bank account? (If you are a prisoner, include funds in your prison account, and provide the certificate attached, signed by an officer of the prison)

☐ Yes ☒ No

Name(s) and address(es) of bank: _____

Present balance(s): \$ _____

Do you own any cash? ☐ Yes ☒ No Amount: \$ _____

Do you have any other assets? (If "yes," provide a description of each asset and its estimated market value.)

☐ Yes ☒ No

8. What are your monthly expenses?

Rent: \$0 _____ Utilities: \$0 _____

Food: \$0 _____ Clothing: \$0 _____

Charge Accounts:

Total Owed On

<u>Name of Account</u>	<u>Monthly Payment</u>	<u>This Account</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

Do you have any other debts? (List current obligations, indicating amounts and to whom they are payable).

none

I consent to prison officials withdrawing from my trust account and paying to the court the initial partial filing fee and all installment payments required by the court.

I declare under penalty of perjury that the foregoing is true and correct and understand that a false statement herein may result in the dismissal of my claims.

March 21, 2008

DATE



SIGNATURE OF APPLICANT

Reporter Transcript Exhibit 'A'

1 MONDAY, JULY 12, 2004

9:00 O'CLOCK A.M.

2 P R O C E E D I N G S

3 ---o0o---

4 THE COURT: David Mairs, Jr., Case 132965.
5 Defendant is present, represented by Mr. Oliveros.
6 Ms. Frugoli for the People. Jessica Fort for probation,
7 assigned to this courtroom.

8 We have this on for sentencing. I also have been
9 advised that the defense is requesting and inviting the
10 Court to strike his prior violent felony, which was a 211
11 robbery, and we should address that matter first before we
12 proceed to sentencing.

13 In that regard, I've read the pleadings that have been
14 filed in this matter in support and opposition to the
15 request; specifically, I've reviewed the defendant's request
16 and the People's opposition and the declaration of Deputy
17 District Attorney Howard Skebe in opposition to the request
18 to strike the prior.

19 I would, as a tentative ruling, indicate that I'm not
20 inclined to strike the prior; however, I'll hear from
21 Mr. Oliveros, primarily, and then, Ms. Frugoli, if she
22 wishes, in response.

23 Mr. Oliveros?

24 MR. OLIVEROS: Yes, your Honor. As I stated in my
25 papers, we're asking the Court to exercise its discretion to
26 dismiss the strike which was alleged and admitted in the
27 Information.

28 Mr. Mairs does have a history. The priors involve some

1 violence. The case before the Court, jury trial involved
2 the theft of some hole saw blades, and I don't want to
3 recite the facts of the whole trial. We all were here and
4 we all know it.

5 But the Court considers the sentence coupled with the
6 nature of the conviction, I believe that sentence would be
7 disproportionately -- unjustly disproportionate to the
8 actual conviction.

9 If you look at the fact the hole saw blades were
10 recovered, so there was no actual loss to the victim,
11 Jackson's Hardware Store. You look to Mr. Mairs' prospects
12 in that Mr. Mairs has an ongoing drug problem.

13 Now, the probation report indicates that he had been
14 clean for some time. However, a person who knows drug
15 addicts, knows it's a life long battle. A person who is a
16 drug addict doesn't simply become clean and that's it. A
17 drug addict does go through relapses and, also, a drug
18 addict doesn't completely get rid of some of the other
19 choices that -- some of the other habits that they've had in
20 their past as far as decision making choices in their life.

21 Mr. Mairs comes before the Court to let you know that he
22 does have prospects. You know that he's an electrician. He
23 does have family, and I want to, with the Court's
24 permission, allow either his adopted mother or father, the
25 Banducci's, who are present in the courtroom, I'd like to
26 give them an opportunity to speak and address the Court for
27 a few minutes.

28 This is a case in which Mr. Mairs does show some

1 promise. He did transfer into the program pod, the C Pod.
2 He's doing well there, and the information I have now is
3 that he has been accepted into the CURA program, and the
4 CURA program is a longterm residential treatment facility.
5 It's similar to the Delancy Street program, which is a
6 highly structured, longterm program, which I believe is a
7 minimum of two years.

8 The CURA program is an 18-month residential treatment
9 facility, so if the Court is prepared to grant the request
10 to dismiss the strike and allow him to be placed on
11 probation, Mr. Mairs will not be going off to the streets
12 and resuming his life, he will not be -- in other words, he
13 won't be free on the streets. He will have another 18-month
14 period where he will be under a structured program and I
15 believe CURA program is in Fremont.

16 We're asking the Court consider the recency of the other
17 offenses. There's one thing that I wanted to mention, also,
18 with respect to his parole.

19 You heard testimony by Mr. Mairs that one of the reasons
20 why he did not want to report to his parole agent in Chico
21 was because he had no resources there, no family, no job.

22 And as I mentioned in my papers, at one point, his
23 situation was so desperate that he had to pitch a tent and
24 call it his residence, and he did use that tent as his home
25 for awhile, but did he come back here and it's clear that,
26 once he was back here, he was able to function.

27 He got a job. You heard testimony from one of the
28 witnesses who testified about Mr. Mairs' character and

1 Mr. Mairs was an excellent employee when he worked for, I
2 believe it was Whole Foods, excellent employee, was very
3 stable, very reliable and trustworthy.

4 So we're talking a man with employable skills and
5 promise.

6 But he's already demonstrated those and I think the
7 Court, if you take those into consideration, will establish
8 that he does have a track record for working.

9 But before we get to that point, Mr. Mairs is willing to
10 ask the Court to allow him to be given a grant of probation
11 so that he can go to the program, and it's not a
12 fly-by-night program. It's a well established, reputable
13 program.

14 And I do have the outline of the program for the Court's
15 information, if you want to look at it. It's available.

16 Mr. Mairs wanted to address the Court, as well, if he
17 may.

18 THE COURT: With regard to the Romero motion?

19 MR. OLIVEROS: We'll hold off until we get to the
20 sentencing part, after Romero. As the Court knows, the
21 Court can consider many factors in deciding whether you want
22 to grant Romero, and the facts that I just mentioned, I
23 think, are relevant factors.

24 The fact that he was convicted of a crime not involving
25 violence -- and I understand that there was a skirmish as he
26 tried to leave the store. You heard testimony by Mr. Mairs
27 about that skirmish, that he was being outnumbered by these
28 other people, and the reason I bring that up is, I don't

1 want this big argument over the fact that some violence was
2 involved. He wasn't convicted of a violent offense in this
3 case and, also, there's a growing trend which may be on the
4 November ballot -- I believe it is going to be on the
5 November ballot -- which will only require a strikable third
6 offense to be a violent offense, only, for a person to
7 qualify under the three strikes law.

8 And since this offense here was a non-violent offense, I
9 would ask the Court to take that into consideration.

10 THE COURT: Well, help me understand. The
11 understanding of the situation now, your client's looking
12 at -- you're requesting I strike this 211 prior because, if
13 I do that, then that removes the presumption of
14 ineligibility for probation.

15 MR. OLIVEROS: Correct.

16 THE COURT: I mean, this is not a situation where
17 the base term gets doubled.

18 MR. OLIVEROS: This is a situation where the base
19 term gets doubled if the Court does not grant --

20 THE COURT: I thought probation, they're only
21 recommending -- they didn't say anything in their
22 recommendation for doubling the base term. The
23 recommendation is simply four years.

24 MS. FORT: I'm sorry, that was an error. It should
25 be doubled.

26 THE COURT: All right. I thought so. And then the
27 probation, who I think have more knowledge about the use of
28 the three strikes law than I do, I thought, "Well, maybe

1 it's not a strikable offense," but it is. The prior 211 is
2 a violent felony.

3 MR. OLIVEROS: Yes, Judge.

4 THE COURT: So he's looking at, if I double the
5 aggravated term, he'd be looking at eight years.

6 MR. OLIVEROS: Looks like he would be looking at
7 six years plus one year on the prison prior.

8 THE COURT: You don't double the prison prior?

9 MR. OLIVEROS: No, just the base term.

10 THE COURT: So seven.

11 MR. OLIVEROS: Seven years. Now if the Court does
12 dismiss the strike, he still could be looking at prison, but
13 not for the doubled sentence, so he can be looking at four
14 years, which is indicated in the probation report.

15 And I'm not sure, actually, if that was a recommendation
16 or error, but probation's recommendation is for four years.
17 But we would ask the Court to -- and I'll get to the
18 sentencing part after the court makes a ruling on the Romero
19 request.

20 THE COURT: All right. Let me hear from the
21 District Attorney with regard to whether I should exercise
22 my discretion and strike the prior.

23 MS. FRUGOLI: I think Mr. Skebe fully set forth the
24 People's position as to why you should not do that. And I
25 think it should be noted that we did already extend to this
26 defendant an extreme benefit by striking one of his other
27 struck, and I think it's a little disingenuous to blame the
28 parole agency for paroling him to the very place where he

1 committed his crimes.

2 One of his robberies was committed in Tracy, and the
3 other one was committed in Chico, so that was his business.
4 He chose to pray upon the victims in those communities, and
5 if he has his family support, including a wife and a child,
6 you would query why they couldn't support him in whatever
7 location he is paroled.

8 So I would submit it and concur with the Court's
9 indication that that strike shouldn't be stricken.

10 Also, as far as probation issues, there's also the 1203
11 (E)(4), and probation has already found that the
12 defendant -- that this is not the type of defendant where
13 the Court should find an unusual circumstance.

14 So under two different provisions -- I know I jumped
15 ahead a bit -- but under the two provisions, the defendant
16 was found not suitable or eligible, and I would submit it on
17 that.

18 THE COURT: Mr. Oliveros, I'll give you the last
19 word on this issue.

20 MR. OLIVEROS: I don't believe there was any
21 robbery in Tracy. Mr. Mairs indicates he's never been to
22 Tracy, so what we're looking at is the Chico robbery.

23 THE COURT: And then, there was the federal bank
24 robbery.

25 MR. OLIVEROS: And the federal case. So we have no
26 information about anything in Tracy.

27 MS. FRUGOLI: I'm looking at the exhibit, one
28 submitted by Mr. Skebe. It says, "Tracy, second degree

1 sentence from Yuba County," so maybe that's where the prison
2 was that he was sent to. I could have misstated that. It
3 says August 2001, and actually it does say, "CASP," which
4 actually would indicate a State Prison commitment, so I
5 misstated that.

6 There is, on the page before that, an indication he was
7 arrested on a bench warrant out of Orville in the year 2000.

8 MR. OLIVEROS: Looks like he went to Tracy for the
9 Reception Center, after he was sentenced to prison.

10 MS. FRUGOLI: So I did misstate that, and I
11 apologize for that.

12 THE COURT: Mr. Mairs, I'm not inclined to strike
13 the prior conviction, as I indicated tentatively. And after
14 hearing both counsel's argument, I just don't think this is
15 an appropriate case where I should exercise my discretion
16 and strike that 211, second degree robbery conviction out of
17 Butte County.

18 It was fairly recent. It involved a knife. It was, in
19 essence, an Estes robbery, which means that it was an
20 aggravated petty theft. When they tried to stop you from
21 leaving them, you used a knife to try to escape.

22 I'm also exercising my discretion to deny that request
23 because I cannot ignore the fact that you were convicted of
24 armed bank robbery in 1986, and that, to me, suggests that
25 there's a long history here of violence and that you're
26 willing to use weapons to effectuate theft of property to
27 support what appears to be a very long history of drug use.

28 It is interesting to me that you're almost like a Jekyl

1 and Hyde. I get a sense you're probably the kind of person
2 that people like. You're friendly. You seem to be fairly
3 responsible and hard working and have the trust of people
4 that know you.

5 But they see a different side of you than I do. I see a
6 side that has been given a lot of opportunities. But
7 whether it's by manipulation or selfishness or immaturity
8 or, I don't know, you continue to do things that just make
9 no sense.

10 The whole case, the whole defense in this case, where
11 you were arguing that you did it as some kind of joke, here,
12 you know, you're an abscond from parole and you know there's
13 cameras going on and you then secrete these hole saws, it
14 just is really bizarre.

15 The store had experienced a lot of theft of hole saws
16 and they can never connect those with you. It's a case that
17 I'm puzzled with why you did what you did.

18 It's hard to believe, sometimes, what people do. Maybe,
19 as you've indicated, you were trying to get caught, trying
20 to get someone to help you; and, although, the jury didn't
21 find you guilty of the methamphetamine in your car, I think
22 they just never felt they could connect that to you, other
23 than, it was your car. It's only your crap in the car, but
24 I think, probably, out of sympathy, they decided not to
25 convict you of the methamphetamine.

26 So I'm going to deny the request to strike the prior.
27 Before we proceed further, I'm going to interrupt this
28 proceeding, if I could, Mr. Oliveros, and take a couple of,

1 what I hope, are brief matters before we proceed to
2 sentencing, if that's okay, because I promised Ms. Miles I
3 would do so.

4 (Whereupon, unrelated matters
5 were heard, reported but not
6 transcribed, herein.)

7 THE COURT: We're back on Mr. Mairs' case. He's
8 present with counsel. Ms. Frugoli for the People.
9 Ms. Fort with the Probation Department.

10 This is now the time ask place set for sentencing in
11 this matter. Any lawful cause why judgment and sentence
12 should not now be pronounced.

13 MR. OLIVEROS: No.

14 THE COURT: Do you waive arraignment for judgment
15 and sentencing?

16 MR. OLIVEROS: Yes.

17 THE COURT: The issue for me, folks, is whether,
18 based upon the nature of this offense, whether this should
19 be aggravated or not. So if it's not aggravated, then he
20 would be looking at two years, plus two, so it would be a
21 four plus one, would be five.

22 Or whether the aggravated facts outweigh the mitigated
23 facts, such that it should be aggravated to the three years,
24 which would make it seven.

25 So that's the dispute I'm having. That's in my mind.
26 That's where I'm struggling. So I'm interested to hear
27 comments from both sides.

28 Mr. Oliveros?

1 MR. OLIVEROS: Yes, Judge. First of all, I believe
2 that now, based under the new United States Supreme Court
3 case Blakely vs. Washington, which was just decided, I
4 believe, June 24th, which overturned a sentencing, a
5 kidnapping sentencing, in the State of Washington, in which
6 the defendant was given a sentence and then a 10-year
7 enhancement, and the Supreme Court justices followed and
8 expanded Apprendi and overturned the conviction, and they
9 held that it is a jury determination for a person to have
10 given or been sentenced to aggravating factors and not a
11 judge or judicial determination.

12 And aggravating factors must be found by a jury beyond a
13 reasonable doubt based under this new sentence. California
14 sentencing schemes have the low, mid and aggravated term,
15 and the middle term is the presumptive term.

16 And based on the Blakely holding, if the Court -- the
17 Court should be limited, at this point, to the middle term
18 in that a jury did not find any aggravating factors, and I
19 believe, and many people who have been following the case,
20 many observers, believe, that the person, the defendant, may
21 now have to either admit aggravating factors or a jury must
22 also find aggravating factors beyond a reasonable doubt.

23 Because, under the case of Apprendi, which was a Kansas
24 case, the sentencing scheme had to be changed such that the
25 prosecutor now has to allege aggravating factors.

26 THE COURT: Have you looked at the state changes
27 that Kansas made in their statutes after Blakely or after
28 Apprendi?

1 MR. OLIVEROS: No.

2 THE COURT: You might, because they're real similar
3 to California. So most people in my position think -- and
4 this is an open issue, and I think you're making a good
5 point, so this may be an issue on appeal -- that in the
6 majority opinion in Blakely, they talked about the fact that
7 Kansas changed their statute in light of the Apprendi, and
8 the changes which I downloaded off West Law are consistent
9 with what California does; and federal sentencing
10 guidelines, as well.

11 But, essentially, it says, as long as the Judge stays
12 within that range -- which, the range is set by law to be,
13 in this case, for Mr. Mairs, the top would be three years,
14 then having been convicted of a prior violent felony, then
15 it's doubled, and the aggravating fact of one year prior
16 prison term adds to that under 667.5.

17 My opinion -- and I think the prevailing view among the
18 judges, which may differ from the defense counsel bar -- is
19 that our sentencing laws are within the guidelines
20 established by Blakely.

21 However, you've made an objection to the Court and
22 that's noted for the record.

23 MR. OLIVEROS: And just to be certain, I do object.
24 If the Court is inclined to sentence him to an aggravated
25 term, I would object under Blakely, since Mr. Mairs has not
26 admitted to any aggravating factors and none have been
27 determined by the jury beyond a reasonable doubt.

28 Your Honor, I would ask that the Court allow

1 Mr. Mairs' -- she's not officially his adopted mom. She
2 took him in when he was around seven years old. She wanted
3 to make a statement to the Court.

4 THE COURT: I want to inquire if the prosecutor has
5 any objections.

6 MS. FRUGOLI: No.

7 THE COURT: Then, she may.

8 MR. OLIVEROS: Just for your information, she's
9 hard of hearing. She can hear you, but it's difficult for
10 her to hear others.

11 So if you could please stand and talk to the Judge.

12 THE COURT: Your name, please?

13 MS. BANDUCCI: Olga Banducci, B-a-n-d-u-c-c-i.
14 Yes. I'm going to start with a sentence that "depression
15 leads to frustration." This I learned when I was taking a
16 psychology class, and I always been thinking, always, in
17 this case, as you know.

18 THE COURT: Why don't you come a little closer
19 because I'm having trouble hearing you now. Now speak up
20 nice and clear, too, because, see my court reporter, Tammy,
21 here, she wants to hear you, as well. That's the lady right
22 here.

23 MS. BANDUCCI: Okay. Shall I start again?

24 THE COURT: No, I think we're okay. You can start
25 wherever you feel comfortable.

26 MS. BANDUCCI: So this boy we know came since he
27 was very little boy, and my kids were playing together in
28 Mill Valley by the swings, by the baseball.

1 So I never thought he was going to end up like this,
2 never in my life. But I don't believe that we supposed to
3 punish them really hard, and never in jail, because then an
4 apple, bad apple, is going to be contaminated, you know,
5 contaminated.

6 This boy has been, always, with a very, very good heart
7 and very good behavior. He had the principal since the
8 beginning, good principals, because when they kick him out
9 or he would run out of home, he was very little.

10 And then he would go to my house. He would never bother
11 us. He would stay underneath the house and he would make --
12 he's a very unique boy because he likes the sheets clean,
13 sheets and blankets, and everybody, you know, so he would be
14 lying down there, hiding or protecting himself with us, and
15 this is a very sentimental thing to me because he never
16 bothered us. He never did anything wrong to my kids.

17 The four of them, they grew up together. And I never
18 accepted all his behavior and neither my kids. My kids were
19 really mad at him, always, trying for him to change a little
20 bit, or whatever, but I have so many things towards his
21 behavior and my kid's behavior.

22 White people is different. Sometimes, because they grew
23 up like that, without laws. He have parents, but they
24 didn't know how to love him. So, actually, I'm going to
25 say, it's not his fault.

26 But later, it's his fault 100 percent. But still, we
27 have all the teaching of our kids, all the examples. This
28 boy, for me, has been good and respectful. He always was

1 treating us like mom and dad, and he used to say, "My mom is
2 Olga. My dad is Dino."

3 And then, I feel, right now, I feel like, "My God, did I
4 raise that kind?" No, because, he has his own character and
5 patience and completely different genes, punishing too much
6 is not very good.

7 Sometimes, I think, if they're in jail, he can do all
8 the work of the electricity, you know, and then I was
9 thinking, maybe, that's why they are putting him for more
10 time, so they can use him, and I just beg you not to be so
11 hard with him, please.

12 THE COURT: Thank you, ma'am.

13 MR. BANDUCCI: He's always welcome in our home.

14 THE COURT: Thank you, sir.

15 MR. OLIVEROS: And, your Honor, Mr. Mairs wanted to
16 address the Court.

17 THE COURT: Any objections, Ms. Frugoli?

18 MS. FRUGOLI: No.

19 THE COURT: Mr. Mairs?

20 MR. OLIVEROS: Judge, because of his vocal
21 problems, he would like for you to have a copy in the event
22 you can't hear him.

23 THE COURT: Do you want to make this part of the
24 record?

25 MR. OLIVEROS: Yes, Judge.

26 THE COURT: Written statement will be marked as
27 Defendant's Exhibit A, for purposes of the sentencing
28 hearing, and admitted into evidence.

1 Wait just ~~for~~ a moment.

2 THE CLERK: Defendant's A, marked for
3 identification.

4 (Defendant's Exhibit A, written
5 statements, marked for identification
6 and received into evidence.)

7 THE COURT: Go ahead, sir.

8 THE DEFENDANT: Honestly, Judge Caskey, I sincerely
9 apologize to the Court, the People, the victims, my family
10 and friends, for my behavior in which I'm before you.

11 I feel most ashamed and embarrassed by my actions.
12 During my incarceration here at the Marin County Jail, I
13 have taken a lot of time to seriously reflect on the poor
14 choices I've made throughout my life, the consequences I
15 have suffered, and what I must change about myself to
16 prevent this from happening in my future.

17 The majority of my life, I have struggled with drug
18 addiction, and when I've remained clean and sober, I've
19 fallen short of the life skills necessary to succeed. The
20 only drug treatment I completed was a 28-day program which
21 amounted to putting a bandaid on a very deep wound.

22 I began the Marin County Jail pre-treatment program in C
23 Pod June 11th, 2004. I have wholeheartedly given myself to
24 the programs of NA and AA and have become actively involved
25 in literacy, critical reading and writing, spirituality and
26 Marin Abused Women's Services.

27 I'm learning the depth of my disease and the negative
28 learned behaviors I must change. The problems and issues

1 I'm confronting in pre-treatment have been very difficult
2 and painful for me, so I want this to grow in a positive
3 direction.

4 I have applied and was accepted to CURA, a highly
5 structured, longterm residential treatment program. My
6 goals are to learn new life skills, build my life on a clean
7 and sober foundation, become a respectful husband, father
8 and role model for my children, an asset in the community
9 and continue and further my trade as a skilled electrician.

10 Again, I apologize to all. I understand the jury's
11 decision in my case. I take responsibility for what I've
12 done and sincerely ask the Court to consider a program of
13 rehabilitation and drug treatment that would benefit, not
14 only me, but society.

15 Respectfully submitted, David Mairs.

16 MR. OLIVEROS: So to conclude, your Honor,
17 Mr. Mairs is asking the Court for a mitigated term and we're
18 asking the Court to stay the prison prior so that the total
19 term would be 32 months, and I will ask the Court to take
20 into consideration the hardship it would be on his daughter.
21 He does have a four-year-old daughter with his wife.

22 His wife, Darcy, is present in the courtroom, as well as
23 his two friends, Adam Potter and Nick Stevenson. He also is
24 the father of some twins. I believe they're approximately
25 eight years old -- 10 years old -- and another daughter who
26 is approximately six years old. And he does have an older
27 son who is 12 years old.

28 So based on all those factors and some of the factors I

1 mentioned in the Romero request, we're asking the Court for
2 a mitigated term and staying the prison priors.

3 THE COURT: Ms. Frugoli?

4 MS. FRUGOLI: I would concur with the probation
5 recommendation. It's not always that they, number one,
6 recommend prison, and, number two, recommend an aggravated
7 term. I think they fully and accurately did set forth the
8 reasons why it should be an aggravated sentence.

9 I think it's a little disingenuous to state that he
10 wants to be a father when he's got, I guess, a total of five
11 children, by my count, and it's most disturbing, someone
12 like Mr. Mairs, who finds himself before the Court because
13 of his own conduct, when he actually has skills that very
14 few defendants who find themselves in this position have.

15 And he actually has the life skills and the job skills
16 and the capability and, apparently, the means to find
17 legitimate employment which so few people have when they
18 come before this court. And I think it's most unfortunate
19 that he has done nothing with those skills and continues to
20 commit these crimes.

21 I think it is disingenuous that he claimed to be clean
22 and sober, yet, now, apparently, is acknowledging that he
23 wasn't.

24 I think the Court hit the nail on the head when you
25 talked about his manipulation and I think, perhaps, it's his
26 intelligence and the skills that he does have that has
27 allowed him to manipulate his way to this position.

28 So other than that, I would concur with the probation

1 the recommendation of the aggravated term, and I would submit
2 it.

3 I would also note, I think that it's a very important
4 factor for the Court to consider the fact that two parole
5 agents have stated that the defendant, in their view, is not
6 ready to change and that he, in fact, had absconded from
7 parole at the time of this incident. So they were certainly
8 unable to supervise him.

9 I don't know why you would think less resources, our
10 probation, could supervise him. And with that, I would
11 submit it.

12 THE COURT: Well, as I've indicated -- did you want
13 to respond, Mr. Oliveros?

14 MR. OLIVEROS: Very briefly. With respect to
15 probation's recommendation, I believe counsel said they
16 hardly or they hardly ever make prison recommendations, it's
17 the Probation Office's policy to recommend prison on a
18 strikes offense, so that's a standard recommendation for
19 prison. They always do that when there's a strike involved.

20 One thing I believe I forgot to mention was, I rarely --
21 maybe once in my 16 years -- have gotten a letter from a pod
22 deputy, a deputy bailiff, writing on behalf of an inmate and
23 it kind of goes to show you that Mr. Mairs is a person that
24 can -- he can comply. He can cooperate. And for the
25 Probation Officer or parole to have made a statement that
26 Mr. Mairs cannot comply, when that is based on performance
27 of several years ago and not now, Mr. Mairs has the
28 resources in Marin County, or would have had them had he

1 been granted probation in Marin County, and not any
2 resources in Butte County.

3 THE COURT: I hear you, and acknowledge that
4 there's some truth to that statement. The problem I'm
5 having, I still am puzzled by Mr. Mairs. It appears that
6 when he's in a structured environment -- and there's not
7 very much more structured environment than the Jail -- he
8 does very well. And it could be a reflection on the fact of
9 his life upbringing, his parents, his childhood, where he
10 didn't have structure and he just doesn't function well in
11 society when he doesn't have that kind of structure.

12 He's got a history here going back to 1986, of criminal
13 conduct with periods of time where he's okay, but throughout
14 all that time period, it appears that the substance abuse
15 issue is driving much of his poor decision making.

16 But all of that, counsel, I want to look at this very
17 carefully and go over so that there's a clear record of what
18 I'm required, by law, to do and what I have the discretion
19 to do.

20 As I've previously ruled, I'm not inclined to strike the
21 prior conviction which triggers that, pursuant to 1203
22 (E)(4), he's not eligible for probation, unless I make a
23 finding that unusual circumstances warrant a grant of
24 probation.

25 The facts in this particular case, by themselves,
26 without any consideration of the defendant and his
27 background, would suggest this is not a particularly
28 egregious case.

1 If you believe that he wasn't the person who was ripping
2 off the store for some period of time -- and there's no
3 evidence before the Court that he was that person -- but
4 that he came in, he heard -- if I recall the testimony, he
5 came in, he overheard some conversation among store security
6 people or store employees about the theft situation of the
7 hole saws, and then, to test the system or to make fun of
8 it, he then takes the hole saws out of the boxes, walks down
9 an aisle, sees the camera, security camera, and then hides
10 the hole saws and then hides the boxes and then leaves the
11 store.

12 Here's an individual who does not want to draw attention
13 to himself, if you think he's logical and rational. And,
14 yet, he does. So he's either not logical or not rational,
15 which, perhaps, is true, so he gets caught exiting the store
16 and he's confronted.

17 He's also driving a vehicle that's full of stuff,
18 including some methamphetamine. Did he want to get caught
19 because he was trying to escape from his responsibilities to
20 his new wife and child? Maybe. Maybe that's what this is
21 all about. It's his desire to escape having to be
22 responsible.

23 I'm not a psychologist, nor do I wish to be, but this is
24 a puzzling case in which maybe, at some point, Mr. Mairs is
25 going to write to me after he's had years of reflection to
26 explain what happened here.

27 However, looking at the situation here, having found
28 this is not an unusual case and he's not eligible for

1 probation -- so I don't need to address that further.

2 Probation is not going to be an option in this case.

3 The question is, again, whether or not this should be
4 aggravated or mitigated or should I go with the presumptive
5 term? The facts that are circumstances in aggravation under
6 Rule 4.421, I find that probation has accurately stated
7 those and I'll state them for the record.

8 The defendant has engaged in violent conduct -- this is
9 4.421 (B) -- and that he's got two prior convictions
10 involving use of force. One was an armed robbery at a bank
11 and the other was a petty theft of a store up in Chico,
12 which, when he was confronted, he used a knife to try and
13 effectuate an escape, which is a robbery, second degree
14 robbery.

15 The second consideration that I believe is true -- I do
16 not agree with 4.421 (B)(1)(2), given that I don't think
17 this recent offense is as serious as his prior offense
18 because, for one reason, he wasn't armed in this case, but
19 in this, number three is correct, he's served a prior prison
20 term which serves as a basis for the 667.5 PC enhancement.
21 He's also served a term in federal prison.

22 He was on probation -- actually, he was on parole at the
23 time of this offense, even though he had absconded from
24 parole, and the fact that he'd absconded from parole is also
25 a circumstance in aggravation, and that his prior
26 performance on parole was unsatisfactory.

27 His rationalization, which is really what it is, of not
28 fulfilling the terms of his parole and not keeping in

1 contact is, at very best, immature and irresponsible, giving
2 him some benefit of the doubt. I'm more inclined -- I think
3 what it really was, he was using methamphetamine again and
4 he knew he would get caught and he didn't care. He was down
5 here doing whatever he was doing and he didn't have any
6 sense -- well, he did have a sense of what he was doing was
7 wrong, but he did not, I guess, think he was going to get
8 caught, which is inconsistent with his conduct at the store
9 in asking to get caught.

10 Then you look at the circumstances in mitigation which
11 is Rule 4.423. I don't agree with the Probation Department
12 that the mitigating -- that there's any mitigating factors
13 in this case. The facts relating to this crime, I don't
14 find that he was participating under circumstances of
15 coercion or duress or that it was partially excusable for
16 some other reason.

17 I further do not find that he exercised caution. I
18 think just the opposite. He wasn't armed, that's true, but
19 I don't find that that's a circumstance in mitigation in
20 this case.

21 And with regard to 4.423 (B), I do not find that he was
22 suffering a condition that would significantly reduce his
23 culpability for the crime. There's no evidence before the
24 Court that he was under the influence of any drugs at the
25 very time he committed this offense.

26 He may have a drug addiction which motivates many of his
27 antisocial behaviors, but I don't find that there's any
28 facts that would mitigate, in this case, his conduct on the

1 occasion in question with regard to the facts relating to
2 the defendant.

3 The factors in aggravation are clearly decisive and so
4 the Court will be imposing the upper term.

5 With regard to the criteria affecting probation, since
6 I've made a determination that this is not an unusual case,
7 then there's no reason for me to state why I'm denying
8 probation.

9 However, just to be on the safe side, I've looked at
10 4.414, and I would find that the criteria showing that
11 probation should be denied outweighed those reasons why I
12 should grant probation.

13 So the Court will impose, for Count II, the aggravated
14 term of three years, which will be doubled pursuant to the
15 three strikes law, as required by law, so that's six years.

16 There's a one-year enhancement, which will not be
17 stayed, under 667.5 (B). So he is ordered to serve seven
18 years in prison.

19 He's advised that there's going to be a three-year
20 period of parole upon his release from prison. If he
21 violates parole, he would then be ordered -- could be
22 ordered to serve up to an additional year in prison, and
23 that parole could be extended to a total of four years.

24 He's ordered to pay a \$20 fine pursuant to 1465.8. Pay
25 a restitution fine in the amount of \$600 pursuant to 1202.4,
26 plus an additional \$600, which is suspended pending
27 successful completion of parole. If he doesn't complete
28 parole, then that \$600 additional penalty is imposed by law.

1 As to Count IV, he's ordered to serve ~~six~~ months county
2 jail, concurrent with any sentence he's already served,
3 which is, essentially, a time-served sentence.

4 Any questions, Mr. Oliveros?

5 MR. OLIVEROS: Yes, your Honor. I don't want to
6 belabor the point, but I did voice my objection to the
7 aggravated term before you even made a ruling on it.

8 So just so the record is clear, I do object to the
9 aggravated term under Blakely vs. Washington.

10 THE COURT: Noted. And I think you're covered.
11 But I think that's a good idea, to make it very clear you
12 object. Mr. Mairs, obviously, understands his right to
13 appeal not only the jury's decision but the Court's
14 sentence, and, Mr. Oliveros, you understand your obligations
15 in that regard? You have 60 days in which to file a notice
16 of appeal, and I will not take any appeal personally.

17 MR. OLIVEROS: Credits, your Honor?

18 THE COURT: Yes, we need to ascertain his credits.
19 I'm showing that he has a total of 208 actual, good time,
20 51, work time, 51, for a total of 310.

21 That would be from 12/17/03 to 4/20/04, which would be
22 125. And then, 4/21/04, June 28th, '04, of 69, and then
23 June 29th, '04, to July 12th, 14, for a total of 208, plus
24 good time, work time, 310.

25 MR. OLIVEROS: I have a slightly different figure.

26 THE COURT: Good.

27 MR. OLIVEROS: I have 194 actual. I'm sorry, I
28 have 209 actual days and 51 good time, 51 work time, for a

1 ~~total~~ of 311. He was arrested on December 17th of 2003.

2 THE COURT: December what?

3 MR. OLIVEROS: December 17th. From December 17th
4 through the 31st, that's 15 actual days, and today is July
5 12th, that's the 194th day of the year.

6 THE COURT: I gave you 209, counsel.

7 MR. OLIVEROS: I'm sorry.

8 THE COURT: I had 208, but I'll give you the extra
9 day. I have some mercy in my heart. 209, plus 51, plus 51,
10 total 311. We're this recess. Thank you.

11 (Whereupon, the proceedings were
12 concluded.)

13 ---o0o---

1 STATE OF CALIFORNIA)
2)
3)

4 COUNTY OF MARIN)
5)
6)

7 I, TAMARA WILSON, an Official Shorthand Reporter of
8 the State of California, County of Marin, do hereby certify
9 that the above proceedings were reported by me, a
10 disinterested person, and were thereafter transcribed under
11 my direction into computer-aided transcription and that this
12 is a true and correct transcription of said proceedings.
13

14 I further certify that I am not of counsel or
15 attorney for either or any of the parties in the foregoing
16 proceedings and caption named, nor in any way interested in
17 the outcome of the cause named in said caption.
18

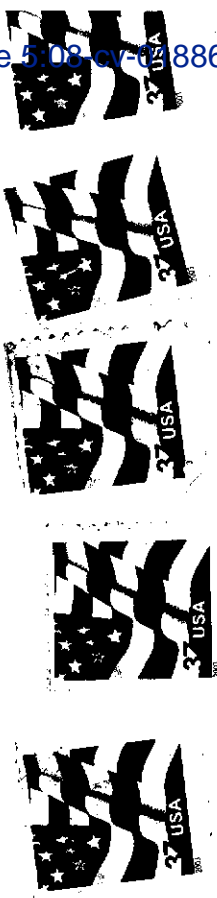
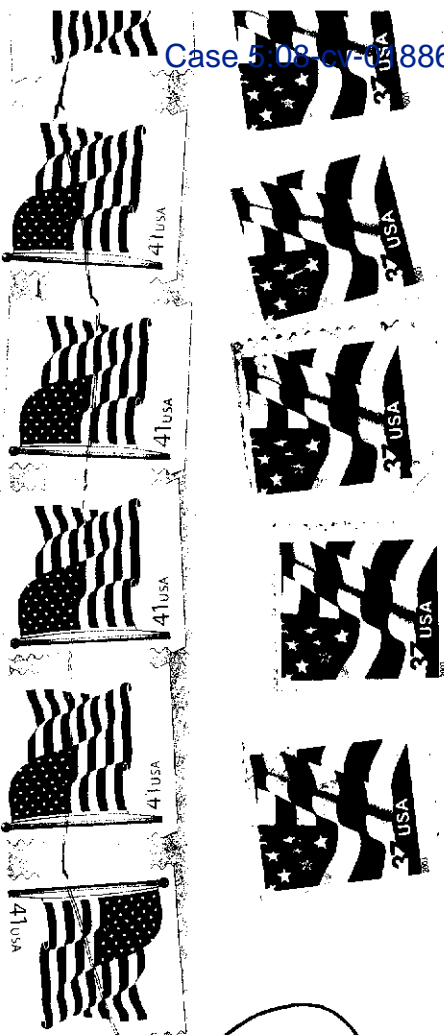
19 Dated: The 29th day of August, 2004.
20

21 Tamara Wilson
22

23 TAMARA WILSON, CSR# 10410
24
25
26
27
28

DAVID MAIRS T25433 14084
SQSP SAN QUENTIN CA -
94974

ENCLOSURE 1-32



RECEIVED

APR - 8 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



420 941020000 99 1000



0000

94112

United States District Court
Northern District
450 Golden Gate Ave.
San Francisco, CA 94102

PRO SE

Legal Mail